No. 93-6497

In The

Supreme Court of the United States

October Term, 1993

FRANKLIN BASIL McFARLAND,

v. *Petitioner,*

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, IDAHO, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does a federal district court have jurisdiction to stay the enforcement of a state death penalty judgment prior to the filing of a federal habeas corpus petition?

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For The Fifth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, IDAHO, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI*

This case presents important questions concerning the fair and timely enforcement of presumptively final and valid state court judgments. *Amici* are States which have an interest in finality, the enforcement of their state laws, and the orderly and proper administration of their

criminal justice systems. These important interests are threatened when federal courts grant stays in state court proceedings prior to the filing of a federal habeas petition. Additionally, *amici* have comity concerns about the ability of federal courts to stay state court proceedings in our federal system.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the U.S. Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

Petitioner Franklin Basil McFarland was convicted and sentenced to death for aggravated sexual assault and murder. *See McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). This Court denied direct review. *McFarland v. Texas*, 113 S.Ct. 2937, 124 L.Ed.2d 686 (1993).

In the U.S. District Court for the Northern District of Texas, petitioner filed a motion for a stay of execution and a request for appointment of counsel to prepare a federal habeas petition. The motion and a request for a certificate of probable cause were denied because the court concluded it lacked jurisdiction to issue a stay in the absence of a pending habeas corpus proceeding. *McFarland v. Collins*, No. 4:93-CV-714-A (N.D. Tex. Oct. 2, 1993).

In the U.S. Court of Appeals for the Fifth Circuit, petitioner then applied for a certificate of probable cause and filed a motion for stay of execution and a request for appointment of counsel. *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993) (per curiam). In denying the request, the Fifth Circuit held no stay could issue under the federal habeas statute because there was no "pending" habeas petition. *Id.* at 49. Alternatively, the court noted, petitioner had failed to "make the minimal showing necessary to establish entitlement to a stay." *Id.* This Court granted certiorari review. *McFarland v. Collins*, 114 S.Ct. 544, 126 L.Ed.2d 446 (1993).

SUMMARY OF ARGUMENT

This case presents a question of statutory construction: Is there any federal statute which confers jurisdiction on a federal habeas court to stay enforcement of a state court judgment *prior* to the filing of a petition for a writ of habeas corpus ("pre-petition stay")? Petitioner essentially asks the Court to stretch the applicability of existing statutes and to permit automatic stays in all potential federal habeas corpus death penalty proceedings where only an application for appointment of counsel is submitted. Only Congress can establish this policy, including what threshold requirements should be satisfied before the petitioner may avail himself or herself of the federal forum.

In all habeas proceedings, the burden lies with the petitioner to establish that his or her constitutional or federal rights were violated. In this case, petitioner asks this Court to establish a policy for the first time that would result in automatic delay prior to the commencement of any actual habeas proceeding. Without any showing that substantial constitutional rights may be at stake, the criminal justice interest in finality cannot be so easily displaced.

For 201 years, the Anti-Injunction Act has prohibited federal court stays of state court proceedings, absent narrow exceptions. 28 U.S.C. § 2283. No exception under this statute permits pre-petition stays. Additionally, as this Court has recognized, a stay of state court proceedings by a federal court is a significant intrusion into the sovereign power of the States to administer criminal justice systems and enforce lawful judgments. *See, e.g., In re Blodgett*, 503 U.S. ___, 112 S.Ct. 674, 676, 116 L.Ed.2d 669, 674 (1992) (per curiam); *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990) (per curiam). The intrusion in this case is exacerbated by the fact that there is no jurisdiction for a federal court to issue a pre-petition stay.

The plain language of the federal habeas stay provision, 28 U.S.C. § 2251, requires a habeas petition to be filed before a federal court holds jurisdiction to stay a

state court judgment. In fact, the legislative history to this provision illustrates the history of abuse resulting from automatic stays. In 1934 Congress abolished the automatic stay which had operated in all habeas corpus proceedings since 1867. This was necessary to curb the abusive delay which resulted from the automatic stay. For sixty years, Congress has not changed this policy.

Other statutes do not permit pre-petition stays. The All Writs Act permits federal courts to issue writs "in aid of" their jurisdiction only *after* jurisdiction has vested (*i.e.*, a habeas petition has been filed). *See* 28 U.S.C. § 1651(a). Provisions under the Anti-Drug Abuse Act of 1988 have not modified the stay standards contained in section 2251, which are still controlling. *See* 21 U.S.C. § 848(q). Section 2251 is the sole provision in the federal habeas statute concerning federal stays of state court proceedings. Its terms continue to govern habeas proceedings.

Assuming *arguendo* this Court would permit pre-petition stays under current law, it will be necessary to determine (1) who holds the burden to obtain a stay, and (2) what threshold showing would have to be satisfied before a pre-petition stay could issue. *Amici* respectfully submit that Congress is the proper branch of government to determine whether, and under what circumstances, pre-petition stays should be permitted. Congress is in the best position to balance the divergent interests at stake and resolve such policy questions as whether appropriation of funds for the pre-petition appointment of counsel is warranted.

ARGUMENT

I. Stays of Presumptively Final and Valid State Court Judgments Issued By Federal Courts Before the Filing of a Federal Habeas Corpus Petition Impinge On Important State Interests

There are multiple opportunities for, and potential sources of, delay in the federal habeas process. *See, e.g., Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514, 2520 n.7, 120 L.Ed.2d 269, 281 n.7 (1992) ("condemn[ing] . . . any

efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution"); *In re Blodgett*, 503 U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (per curiam) (federal court delay). This case presents questions concerning the spectre of "pre-petition" delay; that is, delay occasioned *before* a federal habeas petition has been filed.

When considering the issue of delay in federal habeas corpus proceedings, one must remain mindful of the "secondary and limited" function of collateral review. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *see also Brecht v. Abrahamson*, 113 S.Ct. 1710, 1719-20, 123 L.Ed.2d 353 (1993). In a federal habeas proceeding, the petitioner brings a civil action to challenge an otherwise presumptively final and valid state court criminal conviction and sentence. *Barefoot*, 463 U.S. at 887. The burden therefore correctly lies with the petitioner to establish that his or her constitutional or federal rights were in fact violated before the state court judgment can be disturbed.

Federal habeas litigation – while sometimes necessary to vindicate important federal rights – is not without its costs. Any delay entails at least "the potential for prejudice to the State." *Blodgett*, 112 S.Ct. at 676, 116 L.Ed.2d at 674. The enforcement of the state court judgment is suspended pending final resolution of the collateral attack. *Id.* "Neither innocence nor just punishment can be vindicated until the final judgment is known." *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991). Victims of the crime – and their family members and friends – cannot attain closure until there is finality. Delay also undermines the deterrence objectives of criminal law. *See, e.g.*, L. Powell, *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035, 1035 (1989) (noting the "years of delay between sentencing and execution . . . undermine[] the deterrent effect of capital punishment"). In the event a second state trial is required, its outcome and accuracy may turn on

the reliability and availability of any remaining "stale" evidence. *See, e.g., McCleskey*, 499 U.S. at 492; *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring and dissenting).

While any delay in the collateral review process levies costs on the criminal justice system, pre-petition delay exacts its own unique consequences. The price of this delay at this incipient stage is particularly high since there has been no showing that substantial constitutional rights may be in issue. Without such a showing, the petitioner is in a "no lose" situation in obtaining this delay, receiving the benefit of an automatic pre-petition stay and lacking any meaningful incentive to investigate or initiate a possible federal habeas corpus case promptly. Moreover, this pre-petition delay typically permits subsequently appointed counsel to engage in a "fishing expedition" to search for *potential* collateral issues to relitigate and fosters the use of federal habeas corpus in a manner it was never intended to be used. *See, e.g., Brecht*, 113 S.Ct. at 1719, 123 L.Ed.2d at 369-70, (discussing distinction between direct and collateral review). In the meantime, a pre-petition stay casts doubt on the ultimate finality of the presumptively valid state court judgment. This "no lose" situation occurs all within the shield of a federal court stay of state court proceedings and *prior* to any *pending* federal habeas action. Moreover, as has become common in many habeas cases, there will likely be further delays *after* a habeas petition is actually filed.

In *Blodgett*, this Court referred to the "severe prejudice" sustained by the State from a prolonged stay of execution and failure of the federal court to resolve the case. 112 S.Ct. at 676, 116 L.Ed.2d at 674. Substantial delay is also likely to result from requests for pre-petition stays.[1] This may appear to be a minimal burden in the

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[1] In some federal district courts, for example, a petitioner may obtain a stay for nearly six months *prior* to the filing of a

context of a *single* case. This *initial* delay, however, may likely be augmented by other delay *after* a habeas petition is filed. Moreover, *amici* are concerned with the overall effect automatic pre-petition stays would have on the enforcement of substantive state criminal law and state court judgments in *all potential* habeas cases.

Significantly, the history of the federal habeas corpus statute provides a policy warning to be heeded. During the first 67 years under the federal habeas statute – when stays were automatic – they were abused as a tactic for delay. *See* notes 22 to 25, *infra*, and accompanying text. Congress, ultimately curbed this abuse by eliminating automatic stays. Only Congress can decide whether the existing statutory prohibition against automatic stays should be modified. In fact, in this case serious questions have already been raised concerning "a manufactured procedural emergency" and the absence of any "legitimate basis for the brinkmanship that has occurred here." *McFarland v. Collins*, 8 F.3d 258, 259 (5th Cir. 1993) (Jones, J., dissenting).

Finally, important comity concerns are implicated in this case. The federalism ramifications under the federal habeas statute are already well-recognized.[2] The exercise of federal court stay authority here also affects delicate comity concerns under the Anti-Injunction Act. For 201

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petition without any threshold showing that meritorious claims may ultimately be alleged. *See* note 27, *infra*. In this case, the Texas Resource Center asked the state court to "grant new counsel *at least 120 days* to investigate, research, prepare and file [a] habeas petition." Petitioner's Brief on the Merits, at 9 (citation omitted; emphasis added).

[2] *See, e.g., Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2559, 115 L.Ed.2d 640 (1991) (noting "most of the price paid for federal review of state prisoner claims is paid by the States"); *McCleskey*, 499 U.S. at 491; *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982).

years, Congress has maintained a policy expressly precluding federal court stays of state court actions, subject to narrow limitations. *See* note 5, *infra*. The plenary authority of federal courts to stay state court proceedings has historically been reserved for the most extraordinary circumstances and exercised only after a specific showing has been made that substantial rights or interests are in jeopardy. In contrast, the petitioner's position would make pre-petition stays the norm in virtually all federal habeas capital cases.

II. Federal Courts Lack Statutory Authority to Stay the Enforcement of A Presumptively Final and Valid State Court Judgment *Before* a Federal Habeas Corpus Petition Has Been Filed

A. Overview: Is There Any Statutory Basis for a Pre-Petition Stay?

Three fundamental propositions pertain to the matter at bar. *First*, federal courts have limited jurisdiction and may resolve only those cases over which express authority has been conferred by the U.S. Constitution or a congressional statute.[3] *Second*, federal habeas corpus review of state court judgments is a statutory remedy, not a constitutional one.[4] *Third*, the Anti-Injunction Act, in pertinent

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[3] *See, e.g., Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982); *see also* C. Wright, *Law of Federal Courts*, at 22 (4th ed. 1983) ("The presumption is that the court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists.").

[4] As one respected judicial committee has noted:

> Contrary to what may be assumed, the Constitution does not provide for federal habeas corpus review of state court decisions. The writ of habeas corpus available to state prisoners is not that mentioned in the Constitution. It has evolved from a statute enacted by Congress in 1867, now codified at 28 U.S.C. § 2254.

Judicial Conference of the United States, Report and Proposal of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, at 4 n.2 (Aug. 23, 1989) [hereinafter *Powell Committee Report*]; *see also* D. Lungren & M. Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, 40 UCLA L. Rev. 295, 300 & n.15 (1992) [hereinafter *Public Policy Lessons*] (distinguishing three forms of habeas corpus).

part, requires express authority for a federal court to issue a stay involving a state court proceeding. 28 U.S.C. § 2283.

It follows from these three propositions that an express source of *statutory* authority must be identified before a federal habeas court may issue a pre-petition stay in a state court proceeding. As this Court has aptly noted, "federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings *only in specified circumstances*. Before granting a stay, therefore, federal courts must make certain that *an adequate basis exists for the exercise of federal power*." *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990) (per curiam) (emphasis added).

Resolution of this issue of statutory construction will therefore turn on whether Congress has expressly authorized federal courts to issue pre-petition stays. The Fifth Circuit correctly held that no such authority exists. *McFarland*, 7 F.3d at 49. In contrast, the petitioner asks this Court to stretch the statutory language to cover situations it was never intended to reach. Congress, not the judiciary, is the proper branch to entertain such a proposal.

B. Anti-Injunction Act: 28 U.S.C. § 2283

The Anti-Injunction Act has long prohibited federal court stays of state court proceedings.[5] The Act's only

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[5] *See* 28 U.S.C. § 2283 (reproduced in Appendix); *Mitchum v. Foster*, 407 U.S. 225, 231-36 (1972) (discussing history of statute); Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335; *see also Atlantic Coast*

pertinent exception for the matter at bar is the "expressly authorized by Act of Congress" exception.[6] As this Court has succinctly framed the inquiry before, if a stay under any federal statute prior to the filing of a habeas petition "is not an 'expressly authorized' statutory exception, the anti-injunction law *absolutely prohibits* in such an action all federal equitable intervention in a pending state court proceeding, whether civil or criminal, and *regardless of how extraordinary the particular circumstances may be.*" *Mitchum*, 407 U.S. at 229 (emphasis added). None of the federal statutes identified by the petitioner – including (1) the federal habeas stay provision; (2) the All Writs Act; and (3) 21 U.S.C. § 848(q), as established by the Anti-Drug Abuse Act of 1988 – provides that a pre-petition stay qualifies under this exception.

C. Federal Habeas Stay Provision: 28 U.S.C. § 2251

1. Plain Meaning Analysis

The federal habeas statute contains only one provision concerning the authority of federal habeas courts to stay state court proceedings. 28 U.S.C. § 2251 (reproduced in Appendix). While section 2251 does constitute an exception to the Anti-Injunction Act,[7] it does not authorize pre-petition stays. A stay may issue under this provision only *after* a habeas proceeding has commenced (*i.e.*,

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Line R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286 (1970) (noting statute serves as "an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions"); *id.* at 287 (noting "the exception should not be enlarged by loose statutory construction").

[6] *See, e.g., Mitchum*, 407 U.S. at 235-36 (discussing limited applicability of remaining two exceptions).

[7] *See Ex Parte Royall*, 117 U.S. 241, 248-49 (1886); *see also Mitchum*, 407 U.S. at 234-35 & n.16.

federal jurisdiction has vested upon the filing of a habeas petition).

The plain meaning of the language resolves the issue.[8] On its terms, a stay of state court proceedings may issue under the statute *only* when "a habeas corpus proceeding is *pending*" before the federal judge. 28 U.S.C. § 2251 (emphasis added). The plain meaning of "pending" refers to that period between an initiating and concluding act. "Pending" is defined as "[b]egun, but not yet completed. . . . Thus, an action or suit is 'pending' from its inception until the rendition of final judgment."[9] The statute also requires the habeas action to be pending "before" a federal judge; in other words, the habeas case is "being considered, judged, or decided by" the federal judge.[10]

The federal habeas statute defines the obligations and requirements which must be met before the federal habeas judicial process may be invoked (*i.e.*, when federal court jurisdiction vests). As with other civil cases, the inception of a federal habeas proceeding occurs upon the

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[8] Statutory language is normally conclusive in discerning legislative intent. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (plain meaning rule).

[9] *Black's Law Dictionary*, 1134 (6th ed. 1990); *see also Webster's New World Dictionary of the American Language*, 1051 (1982 2d college ed.) ("throughout the course or process of; during").

The term "pending" is also used in the last sentence of the statute, further demonstrating that Congress intended section 2251 stays only in the context of an existing habeas petition in federal court. *See* 28 U.S.C. § 2251 (noting where no federal stay issues "any such [state] proceeding shall be as valid as if no habeas corpus proceedings or appeal were *pending*") (emphasis added).

[10] *Webster's New World Dictionary of the American Language*, 127 (1982 2d college ed.).

filing of the first pleading.[11] To commence a federal habeas action, a state prisoner must submit an "application . . . in the form of a petition for a writ of habeas corpus."[12] Among other things, fact pleading is required and the petition must "specify all the grounds for relief which are available to the petitioner" and be "signed under penalty of perjury."[13] An insufficient petition may be returned.[14] Once the petitioner has satisfied his or her "responsibilities," the clerk of the district court is "require[d] to file the petition."[15] A preliminary review of the petition is promptly made by the district court, which

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[11] *See In re Connaway*, 178 U.S. 421, 427-28 (1900) (cited in *McFarland*, 7 F.3d at 49); Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.") (cited in *McFarland*, 7 F.3d at 49); *see also* 28 U.S.C. § 2254 Rule 11 (noting Fed. R. Civ. P. may apply to habeas petitions "to the extent that they are not inconsistent with" the Federal Habeas Rules); *In re Lindsey*, 875 F.2d 1518, 1519 (11th Cir. 1989) (per curiam). Federal habeas review is a civil proceeding. *See Hilton v. Braunskill*, 481 U.S. 770, 776 & n.5 (1987); *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 257 (1978).

[12] 28 U.S.C. § 2254 Rule 2(a); *see also* Advisory Committee Note to Habeas Corpus Rule 2 (1976) (noting "requirements of the actual petition"); 28 U.S.C. § 2242 (same).

[13] 28 U.S.C. § 2254 Rule 2(c); *see also id.* (petition must set forth "in summary form the facts supporting each of the grounds"); Advisory Committee Note to Habeas Corpus Rule 4 (1976) (noting fact pleading, not notice pleading, is required); 28 U.S.C. § 2242 (fact pleading requirement).

[14] 28 U.S.C. § 2254 Rule 2(e); *see also* Advisory Committee Note to Habeas Corpus Rule 2 (1976) ("Any failure to comply with the requirements of rules 2 or 3 is grounds for insufficiency.").

[15] Advisory Committee Note to Habeas Corpus Rule 3 (1976); *see also id.* ("If [the petition complies with the requirements of rules 2 and 3], it must be filed and entered on the docket in the clerk's office.").

is under a "duty . . . to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer."[16] Further, any claims should be exhausted before being presented on federal habeas review. *See Rose*, 455 U.S. at 522.

A review of the language and the statutory requirements makes clear that the condition precedent for a stay is the commencement of a habeas proceeding by means of proper application.[17] Since a habeas proceeding is not "commenced" with the filing of a request for the appointment of counsel, federal courts are not vested with jurisdiction to issue pre-petition stays. In sum, a pre-petition stay does not qualify under the "expressly authorized" exception to the Anti-Injunction Act because section 2251 does not supply the jurisdictional basis for such a stay.

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[16] Advisory Committee Note to Habeas Corpus Rule 4 (1976); *see also* 28 U.S.C. § 2243.

[17] In addition to the Fifth Circuit, *McFarland*, 7 F.3d at 49, this construction also comports with the statutory interpretation of section 2251 by other courts. *See Hooks v. Wainwright*, 540 F. Supp. 652, 654, 655 (M.D. Fla. 1982) (Section 2251 "authorizes a federal judge to stay a proceeding against any person detained pursuant to a state court judgment, *but only in connection with a habeas corpus proceeding*. . . . [F]ederal judicial authority to stay execution of a sentence imposed in a state criminal proceeding is *limited to cases in which the court's habeas corpus jurisdiction has been properly invoked.*") (emphasis added); *see also Reese v. Teets*, 248 F.2d 147, 149 (9th Cir. 1957) (noting a district court "has no power to stay the execution of judgment of a state court save as an incident to the exercise of its jurisdiction in habeas corpus"; holding it is improper to issue a section 2251 stay where the exhaustion requirement has not been met).

2. Legislative History Analysis

Any possible doubt concerning the construction of section 2251 is resolved by a legislative history analysis.[18] From 1867 to 1934, the federal habeas statute provided for an automatic stay of all state court proceedings pending resolution of a filed petition for writ of habeas corpus and any subsequent appeal.[19] Significantly, under this language, the automatic stay was triggered by the filing of a federal habeas proceeding and remained in effect until any federal appeals were resolved.[20]

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[18] The plain meaning of the language of a statute is ordinarily conclusive, absent a statutory ambiguity, contrary legislative intent which is clearly articulated, or other exceptional circumstances. *See, e.g., United States v. Rojas-Contreras*, 474 U.S. 231, 235 (1985); *Garcia v. United States*, 469 U.S. 70, 75 (1984); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984).

[19] *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (first habeas corpus statute permitting federal court review of state court judgments) (reproduced, in pertinent part, in Appendix); *see also Barefoot*, 463 U.S. at 892 n.3 (discussing automatic stay provision in 1867 statute). Two subsequent amendments to this provision did not substantively modify this automatic stay language. *See* Act of March 3, 1893, ch. 226, 27 Stat. 751 (six month time limit for appeals); Act of Feb. 13, 1925, ch. 229, § 8(c), 43 Stat. 940 (three month time limit for appeals); *see also* H.R. Rep. No. 1726, 73d Cong., 2d Sess. 1 (1934) (discussing 1934 amendment); *id.* at 2 (comparing proposed 1934 amendment to prior law); *see also* S. Rep. No. 1426, 73d Cong., 2d Sess. 2 (1934) (same).

[20] In addition to the statutory language of the 1867 statute (reproduced, in pertinent part, in the Appendix), *see Rogers v. Peck*, 199 U.S. 425, 436 (1905) (The stay provision "requires the state courts and authorities to make no order and entertain no proceeding which shall interfere with the full examination and final judgment in a *habeas corpus* proceeding in the Federal courts."); *Lambert v. Barrett*, 159 U.S. 660, 662 (1895) ("[N]o order staying proceedings under state authority is made a condition to such stay, the bare pendency of the appeal has that effect."); *In re Shibuya Jugiro*, 140 U.S. 291, 295 (1891) ("[T]he jurisdiction of the state court . . . is restrained only pending the proceedings in the courts of the United States, and until final judgment therein.").

On at least two occasions, Congress has amended the federal habeas statute to correct patterns of abusive delay. Congress adopted the certificate of probable cause requirement in 1908 to curb the practice of frivolous habeas appeals filed for delay purposes.[21] Under this provision, federal habeas appeals are not automatic as a judicial determination must first be made that a habeas appeal is warranted. *See* 28 U.S.C. § 2253 (reproduced in Appendix). In 1934, Congress abolished the automatic stay rule because it too had been used as a delay tactic. According to the House report:

> [The automatic stay provision] gives defendants in criminal cases in State courts a powerful weapon to delay a trial and possibly defeat the ends of justice. The effect of the pending bill is to amend the existing law so as to abolish automatic stays under such circumstances and to provide that the State-court proceedings shall be stayed only if the Federal judge grants a stay in the exercise of discretion.[22]

Under the 1934 amendment, the stay could be issued "by a judge of any court of the United States *in which are*

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[21] *See Barefoot*, 463 U.S. at 892 n.3 (discussing history of certificate of probable cause requirement); *see also Public Policy Lessons, supra*, at 307-08 (same).

[22] H.R. Rep. No. 1726, 73d Cong., 2d Sess. 1 (1934); *see also id.* at 2 (Attorney General letter concerning purpose of legislation); *Lambert*, 159 U.S. at 662 (noting the stay provision has been used to pursue "many appeals . . . on inadequate and insufficient grounds").

pending any such [habeas] proceedings or appeal."[23] The new condition precedent required the exercise of judicial discretion to determine whether to issue a stay once jurisdiction had been vested. No further substantive changes have been made to this "pending" language.[24]

In addition to the amendment language, the 1934 Senate debate makes clear that the stay could issue only after a habeas petition had been filed (*i.e.*, after federal jurisdiction had vested). During this debate, Senator Walsh noted that "[t]his bill merely amends the law so as to make a stay of proceedings in a State court discretionary with the Federal judge *before whom petition for habeas corpus, originally or on appeal, is pending*." 78 Cong. Rec. 12,366-67 (June 18, 1934) (emphasis added). Senator Robinson also described the nature of the problem with current law as one where "[a] stay of execution has been issued *under a habeas corpus proceeding*, which makes it impossible to reach a conclusion in the [state] case within a reasonable time." *Id.* at 12,366 (emphasis added). After this brief debate, the Senate adopted the legislation.[25]

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[23] Act of June 19, 1934, ch. 673, 48 Stat. 1177; *see also* H.R. Rep. No. 1726, 73d Cong., 2d Sess. 2 (1934) (emphasis added) (comparing proposed amendment to existing law).

[24] *See* 28 U.S.C. § 2251, *as amended by* Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 966-67 (revision of title 28, U.S. Code); *see also* H.R. Rep. No. 308, 80th Cong., 1st Sess. A179, A265 (1947) (same).

[25] *See* 78 Cong. Rec. 12,367. The Senate debate on the legislation also referred to one particular Massachusetts murder case in which the automatic stay had been used for purposes of delay. *See id.* at 12,366-67 (June 18, 1934) (remarks of Sen. Walsh); *see also* H.R. Rep. No. 1726, 73d Cong., 2d Sess. 1-2 (1934) (discussing same case).

There was no substantive debate in the House concerning the legislation. *See* 78 Cong. Rec. 10,755-56 (June 7, 1934) (approving legislation).

The legislative history for section 2251 demonstrates that Congress acted to end abusive delay by abolishing the automatic stay and requiring the exercise of judicial judgment on whether a stay should issue after the habeas proceeding had commenced. Critically for the petitioner, there is no support in the legislative history for the proposition that the section 2251 stay could issue *before* federal habeas jurisdiction had vested in a federal court by virtue of a filed habeas petition.

3. The Local Rules in *Brown v. Vasquez* Violate the Separation of Powers Doctrine and Are Inconsistent with Acts of Congress

Contrary to the plain meaning and legislative history of the statute, the Ninth Circuit has held that section 2251, in conjunction with two local rules, furnishes a district court with jurisdiction to stay an execution before a federal habeas petition is filed so that a state prisoner may apply for the appointment of counsel.[26] In *Brown v. Vasquez* – rejected by the Fifth Circuit and relied upon by petitioner – two local rules permitted entry of a stay for at least 165 days *before* the filing of any habeas petition.[27]

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[26] *See Brown v. Vasquez*, 952 F.2d 1164, 1165 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992). In *Brown*, the Ninth Circuit acknowledged that a habeas petition, within the meaning of the federal statute, had not been filed. Instead, the petitioner filed a request for counsel to aid in the preparation of a habeas petition. *See id.* at 1166 & n.7. The court held that "a habeas corpus proceeding is *pending* before a federal district court when . . . an application [for the appointment of counsel] is filed." *Id.* at 1169 (emphasis added).

[27] One local rule of the U.S. District Court for the Central District of California provided an automatic 45-day stay of execution upon the filing of an application for appointment of counsel and temporary stay of execution. *See Brown*, 952 F.2d at 1165 n.1 (reproducing Local Rule 26.8.7(b)). Another local rule also permitted a stay of an additional 120 days "to allow newly

A close examination of these automatic stay rules – a *sine qua non* to the *Brown* rationale and holding, *see Brown*, 952 F.2d at 1168, 1169 – shows they were adopted in violation of the Separation of Powers Doctrine and are inconsistent with Acts of Congress. Consequently, *Brown* does not support petitioner's position.

i. Separation of Powers Doctrine

The Separation of Powers Doctrine operates to ensure that "each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, *even to accomplish desirable objectives*, must be resisted." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983) (emphasis added).

Only the Legislative Branch – not a district court – can enact the stay policy embodied by the local rules in *Brown*. For at least four reasons, these local rules constituted "an exercise of legislative power" since they "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . all outside the Legislative Branch." *Id.* at 952.

First, the action altered the obligations and relations of habeas petitioners and the State in federal habeas corpus proceedings. Significantly, under the local rules, enforcement of a presumptively final and valid state court judgment was denied for at least 165 days by the automatic stay provisions. This Court has already recognized that federal court stays frustrate the State "from

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appointed counsel to prepare and file the [habeas] petition." *See id.* at 1165 n.2 (reproducing Local Rule 26.8.7(c)). The validity of these local rules was not contested in *Brown*. *See id.* at 1168. Similar local rules operate in each of the other district courts in California.

exercising its sovereign power to enforce the criminal law." *Blodgett*, 112 S.Ct. at 676, 116 L.Ed.2d at 674.

Second, the local rules circumscribe the long-standing congressional prohibition against federal court stays under the Anti-Injunction Act. Only Congress can accomplish this result, as it has in other contexts. *See, e.g., Mitchum*, 407 U.S. at 234-35 (listing federal statutes qualifying under the "expressly authorized" exception to the Anti-Injunction Act).

Third, the fact that the local rules constitute a legislative act is further demonstrated by recent habeas reform legislation concerning federal court stays. In the current Congress, for example, legislation was introduced in the Senate which would permit a stay of execution in capital cases "upon application to any court that would have jurisdiction over a habeas corpus petition."[28]

Fourth, only Congress, holding the power of the purse, can determine whether, and under what circumstances, federal funds for the appointment of counsel should be appropriated during the pre-petition stage. *See* U.S. Const. art. I, § 8, cl. 1 (Spending Clause).

Yet, "[w]ithout the challenged [local rules], this [automatic stay] could have been achieved, if at all, only by legislation." *Chadha*, 462 U.S. at 953-54. Moreover, the local rules in *Brown* do not qualify as one of the "narrow, explicit, and separately justified" exceptions to the constitutional requirement that all legislation satisfy the Presentment Clauses and bicameral requirement of the Constitution. *See id.* at 956; U.S. Const. art. I, §§ 1 & 7, cls. 2 & 3. Therefore, the promulgation of the local rules bypassed the "step-by-step, deliberate and deliberative" legislative process and avoided "essential constitutional

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[28] S. 1441, § 3(b), 103d Cong., 1st Sess., 139 Cong. Rec. S10,927 (daily ed. Aug. 6, 1993); *see also Powell Committee Report*, at 13-14, 15-16, *supra* (habeas corpus reform proposal, § 2257(a) providing for the mandatory stay of execution following the appointment of counsel after certain conditions have been met).

functions," *id.* at 959, 951, including constitutional safeguards that ensure legislative accountability. *id.* at 946-51, 957-59 (discussing constitutional objectives of the Presentment Clauses and bicameral requirement).

Just as "parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress," C. Wright, *Law of Federal Courts*, at 23 (4th ed. 1983), neither can a federal court establish jurisdiction to issue pre-petition stays by a local rule when such jurisdiction does not exist pursuant to the Constitution or federal statute.[29] The local rules invoked in *Brown* usurp legislative power in violation of the Separation of Powers Doctrine.

ii. Inconsistency With Acts of Congress

The local rules in *Brown* also transgress statutory limits on the ability of federal courts to adopt local rules. Federal courts may not expand or confer jurisdiction which does not previously exist under the Constitution or federal statutes. *See* note 29, *supra*. Since 1793, Congress has specified that local rules of court "shall be consistent with Acts of Congress."[30]

Unlike matters such as the regulation of the federal bar, *see, e.g., Frazier v. Heebe*, 482 U.S. 641, 646 n.4 (1987),

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[29] *See, e.g., Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635 (1924) ("[N]o rule of court can enlarge or restrict jurisdiction."); *cf. Insurance Corp. of Ireland*, 456 U.S. at 711 (Powell, J., concurring in judgment) ("As courts of limited jurisdiction, the federal district courts possess no warrant to create jurisdictional law of their own.").

[30] 28 U.S.C. § 2071(a); 12 C. Wright & A. Miller, *Federal Practice & Procedure*, § 3151, at 216 (1973 ed.) (citing Act of March 2, 1793, ch. 22, § 7, 1 Stat. 335); *cf.* Fed. R. Civ. P. 82 (noting the Fed. R. Civ. P. "shall not be construed to extend . . . the jurisdiction of the" U.S. district courts); Fed. R. Civ. P. 83 (local district court rules may be adopted which are "not inconsistent with" the Fed. R. Civ. P.).

Congress has not left to the federal courts to determine, or expand the circumstances, when state court proceedings may be stayed. Since 1793, Congress has clearly and consistently established a general policy prohibiting such stays in the Anti-Injunction Act. *See* note 5, *supra* (referring to history of statute). The local rules are inconsistent with the Anti-Injunction Act because only Congress can specify when the "expressly authorized" exception may apply.

The local rules are also inconsistent with section 2251, which, as a condition precedent, requires federal jurisdiction to vest by the filing of a habeas petition before a federal court may stay state court proceedings. As already noted, the legislative history to section 2251 clearly establishes that Congress rejected the prior automatic stay provision; stays may only be granted upon the filing of a habeas petition and after the exercise of judicial discretion.

iii. Conclusion

Because the local rules in *Brown* not only violate the Separation of Powers Doctrine, but are also inconsistent with Acts of Congress, *Brown* provides no support for the petitioner's argument.

D. All Writs Act: 28 U.S.C. § 1651(a)

The All Writs Act also does not supply a statutory basis for pre-petition stays.[31] The All Writs Act only enables federal courts to issue writs "in aid of" their *jurisdiction which has already vested*. It has been long-recognized that the statute does not furnish federal district

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[31] *See* 28 U.S.C. § 1651(a) (reproduced in Appendix); *see also Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34, 40-42 (1985) (discussing legislative history).

courts with an *independent* basis for jurisdiction.[32] As already noted, federal habeas jurisdiction does not vest until a habeas petition has been filed. Therefore, the All Writs Act cannot qualify under the "expressly authorized" exception to the Anti-Injunction Act.

Moreover, to conclude that the All Writs Act permits pre-petition stays would circumvent the requirements of the federal habeas statute, a proposition this Court has previously rejected in a related habeas context.[33] The exclusive stay provision in the federal habeas statute is section 2251. Therefore, even assuming *arguendo* the All Writs Act could be used in a pre-petition context, the federal court ability to issue a stay is controlled by the terms of section 2251.

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[32] *See Rosenbaum v. Bauer*, 120 U.S. 450, 454, 458-59 (1887); *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813); *see also Jackson v. Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993); *Brittingham v. U.S. Commissioner of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971); *Benson v. State Board of Parole & Probation*, 384 F.2d 238, 239-40 (9th Cir. 1967); *United States ex rel. Wisconsin v. First Federal Savings & Loan Ass'n*, 248 F.2d 804, 808-09 (7th Cir. 1957), *cert. denied*, 355 U.S. 957 (1958).

[33] In construing the All Writs Act in conjunction with the federal habeas statute, this Court noted:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.

Pennsylvania Bureau of Correction, 474 U.S. at 43; *see also id.* at 42 n.7 (distinguishing other All Writs Act cases since "the habeas corpus statute already expressly provides for" the circumstance in question).

Additionally, federal district courts are courts of limited jurisdiction. *See* note 3, *supra*. If the All Writs Act is construed to permit pre-petition stays there would be no real, discernible limit to the ability of federal habeas courts to stay state court proceedings. Such a result should not be construed without more explicit direction from the Congress.[34]

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[34] Petitioner attempts to rely upon *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), *modified*, *Sampson v. Murray*, 415 U.S. 61 (1974), involving the validity of a corporate merger under antitrust laws, for the proposition that a pre-petition stay of state court proceedings may issue to preserve the "prospective" habeas jurisdiction of a U.S. District Court. For at least two reasons, this case is inapplicable. *First*, the holding in *Dean Foods* has subsequently been limited by this Court to those narrow circumstances where it would be "virtually impossible" for further federal review, "frustrat[ing]" the "congressional grant of authority." *Sampson v. Murray*, 415 U.S. 61, 77 n.33 (1974). This case does not qualify under this limitation. Under the requirements established by the Congress, pursuit of the statutory habeas corpus remedy fully lies with the petitioner. Petitioner therefore has the "responsibilit[y]," under the congressional grant, to meet all the requirements to file a habeas petition. Advisory Committee Note to Habeas Corpus Rule 3 (1976). In fact, petitioner has already filed and dismissed a federal habeas petition. *See McFarland v. Collins*, 8 F.3d 256, 257 (5th Cir. 1993) (per curiam). *Second*, *Dean Foods* arose in a distinguishable circumstance, where a federal court of appeals had jurisdiction to review the enforcement action of a federal agency. In contrast, the matter at bar involves the sensitive comity and federalism concerns of the power of a federal court to stay state court proceedings in a civil collateral challenge to a state criminal court judgment. Clearly, these federal avenues of review serve wholly different objectives in our federal system.

E. Anti-Drug Abuse Act of 1988: 21 U.S.C. §§ 848(q)(4)-(10)

Because there is no constitutional right to counsel in federal or state post-conviction proceedings,[35] any right to counsel must be the product of a legislative determination. In the Anti-Drug Abuse Act of 1988, Congress adopted appointment of counsel standards for federal habeas capital cases when certain conditions are met.[36] These provisions clearly augment, but do not supplant, the federal habeas statute. *See* 21 U.S.C. § 848(q)(4)(B) (applicable to "post-conviction proceedings under" 28 U.S.C. § 2254).

For at least three reasons, these provisions do not authorize pre-petition stays. *First*, no language in section 848(q) indicates that Congress intended to modify in any manner the substantive standards concerning stays of state court proceedings contained in the federal habeas corpus statute. *See* 28 U.S.C. § 2251. No language in section 848(q) provides that federal courts may issue pre-petition stays in state court proceedings. No language suggests that Congress sought to modify the requirements for filing a habeas petition, which are a condition precedent for section 2251 stays. There is also no indication in section 848(q) that Congress changed its long-standing prohibition against automatic stays embodied in section 2251.

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[35] *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *see also Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (Opinion of Rehnquist, C.J.) (noting "the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in non-capital cases").

[36] *See* 21 U.S.C. §§ 848(q)(4)-(10), Pub. L. 100-690, Title VII, § 7001, 102 Stat. 4387, 4393-94 (reproduced in Appendix). The scant legislative history on these provisions sheds no dispositive light concerning the issues raised in the matter at bar. There are also no House or Senate reports concerning these provisions.

Further, there is no hint from the language in section 848(q) that Congress sought to establish a new exception to the Anti-Injunction Act and provide federal courts with new authority to stay state court proceedings. *Compare Mitchum*, 407 U.S. at 234-35 (listing federal statutes qualifying under the "expressly authorized" exception to the Anti-Injunction Act). Absent an affirmative expression by the Congress to the contrary, this Court should not otherwise interfere with the delicate federal-state balance struck by Congress in the Anti-Injunction Act.

Second, where Congress intended the 1988 amendments to affect state proceedings, it clearly knew how to accomplish this result. One provision provides that counsel appointed under the 1988 amendments "shall also represent the defendant in . . . proceedings for executive or other clemency as may be available to the defendant." 21 U.S.C. § 848(q)(8). Clemency proceedings usually follow the conclusion of post-conviction proceedings and typically occur on the eve of a scheduled execution. Congress likely concluded that appointed counsel – who by the time of any clemency proceedings would be intimately familiar with the facts and legal questions in the case – should be under a duty to assist with this stage of the capital case. In contrast, there is nothing in the language to suggest that any other state court proceedings would be affected by the 1988 amendments, including a pre-petition stay of state court proceedings. If Congress had desired to permit pre-petition stays or modify the federal habeas stay standard, it would have done so explicitly.

Finally, federal courts which have construed this provision have held that appointment of counsel under section 848(q) may be made only when there is a pending non-frivolous federal habeas petition [37]

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[37] *See Lindsey*, 875 F.2d at 1519; *see also Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993) (holding "district court must be

Section 2251 is the sole provision in the federal habeas statute concerning federal stays of state court proceedings. Its terms continue to govern habeas proceedings, even following the 1988 amendments.

III. Assuming *Arguendo* A Pre-Petition Stay Is Permitted, This Court Will Need To Decide (1) Who Holds the Burden, and (2) What Threshold Showing Should Be Required For A Pre-Petition Stay

Assuming *arguendo* this Court concludes a federal district court may issue a pre-petition stay, the question will turn to the proper threshold showing the petitioner must make to obtain a pre-petition stay of a presumptively valid and final state court judgment. In other words, what are the "specified circumstances" and "adequate basis . . . for the exercise of [this] federal power" and intrusion into state proceedings before a federal habeas proceeding has commenced? *Demosthenes*, 495 U.S. at 737. Two policy questions must be resolved in defining the threshold standard for pre-petition stays. First, who holds the burden? Second, what should the burden be?

In a federal habeas proceeding, the burden appropriately lies with the petitioner to establish that his or her constitutional or federal rights have been violated. *See, e.g., Fox v. Kelso*, 911 F.2d 563, 569-70 (11th Cir. 1990). Until such a showing has been made in the civil post-

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satisfied, [*inter alia*], that the request for [counsel compensation in state clemency proceeding] is made as part of a non-frivolous federal habeas corpus proceeding"); *In re Lindsey*, 875 F.2d 1502, 1507 (11th Cir. 1989) (per curiam) ("Because Congress did not so state, we conclude that, unless and until he returns to federal court with a petition for habeas corpus setting forth only claims for which he has exhausted all state remedies, [petitioner] has no entitlement" to federally-appointed counsel under section 848(q)); *McKinney v. Paskett*, 753 F. Supp. 861, 865 (D. Idaho 1990).

conviction proceeding, a presumption of validity and finality attaches to the state court criminal judgment. *See, e.g., Barefoot*, 436 U.S. at 887. Similarly, a petitioner traditionally has the burden to establish he or she is entitled to injunctive relief in a federal habeas proceeding.

With regard to the specific burden to be met, even in first habeas petitions reviewed by this Court, "[s]tays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari."[38] At minimum, the threshold standard should not be less stringent than that employed for the stay of an execution under section 2251 *after* a habeas petition has been filed.[39]

In considering possible threshold standards for a pre-petition stay, it is also useful to compare the requirements for obtaining relief in other habeas contexts. In each, the exercise of judicial judgment is required to determine, as a condition precedent, that the request is not frivolous and may be warranted. For example, as already noted, Congress has established requirements for the filing of a federal habeas petition. The district court may dismiss the petition if it is insufficient or frivolous or if claims have not been exhausted. *See* notes 12 to 16, *supra*; *Rose*,

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[38] *Barefoot*, 463 U.S. at 895; *see also Autry v. Estelle*, 464 U.S. 1, 2 (1983) (per curiam) ("Nor are we inclined to adopt a rule calling for an automatic stay, regardless of the merits of the claims presented, where the applicant is seeking review of the denial of his first federal habeas corpus petition.").

[39] The Eleventh Circuit, for example, employs a four-part standard:

> [1] whether the movant has made a showing of likelihood of success on the merits and [2] of irreparable injury if the stay is not granted, [3] whether the stay would substantially harm other parties, and [4] whether granting the stay would serve the public interest.

Bundy v. Wainwright, 808 F.2d 1410, 1421 (11th Cir. 1987); *see also St. John v. North Carolina*, 745 F. Supp. 1165, 1167 (W.D.N.C. 1990) (noting stay of execution standards in other jurisdictions).

455 U.S. at 522 (discussing exhaustion requirement). Similarly, the certificate of probable cause requirement interposes an important judicial screening function. 28 U.S.C. § 2253. Before the denial of a habeas petition in the district court may be reviewed on appeal, the petitioner must make a "substantial showing of the denial of [a] federal right." *Barefoot*, 463 U.S. at 893 (citation omitted).

Several other relevant matters bear on the proper threshold standard. For example, in considering a pre-petition application for a stay, how should a federal court treat serious questions, as raised here, concerning "a manufactured procedural emergency"? *McFarland*, 8 F.3d at 259 (Jones, J., dissenting); *see also Sawyer*, 112 S.Ct. at 2520 n.7, 120 L.Ed.2d at 281 n.7 (condemning deliberate last minute delay by some habeas petitioners). How long may a state court proceeding be stayed pending the appointment of counsel at the pre-petition stage of a habeas proceeding? Should extensions be permitted? *Compare Blodgett*, 112 S.Ct. at 674, 116 L.Ed.2d at 674 (establishing *Blodgett* duty on federal habeas courts issuing stays).

These existing habeas standards may be useful to contemplate if the Court decides to consider the proper standard for pre-petition stays. In sum, petitioner should hold the burden to establish the requisite showing to justify a federal court stay. Moreover, these illustrations reiterate that Congress really is the best forum to make these policy determinations.

IV. Congress Is the Appropriate Branch to Determine Whether, and Under What Circumstances, Pre-Petition Stays Should Be Permitted

Federal habeas corpus review of state court judgments is a statutory creation, established for the first time in 1867. *See* notes 4 & 19, *supra*. Congress plainly may

expand or retract the availability of the statutory writ of habeas corpus, as it has in the past.[40]

The history of the statutory writ shows that Congress abolished the automatic stay provision in 1934 because it was being abused as a delay tactic. For sixty years Congress has not modified this policy. Any expansion on the ability of federal courts to stay the enforcement of a state court judgment in advance of the filing of a federal habeas petition involves an act of legislative power. *See Chadha*, 462 U.S. at 952 (defining "exercise of legislative power").

Moreover, Congress is the appropriate branch to determine whether any modification of section 2251 is warranted. Among other things, the use of the federal court stay authority implicates sensitive comity interests in our federal system. *See* 28 U.S.C. § 2283; *see also Blodgett*, 112 S.Ct. at 676, 116 L.Ed.2d at 674; *Demosthenes*, 495 U.S. at 737. Congress is in the best position to balance these concerns, after fully assessing the many divergent interests affected by federal habeas proceedings. *See, e.g., Public Policy Lessons, supra*, at 298 (noting divergent interests). Congress would also be directly accountable for any legislative changes. This also includes policy determinations whether federal funds should be appropriated for the compensation of counsel during the pre-petition phase. In fact, Congress has before it legislation which may modify the authority of federal habeas courts to stay state court proceedings, as part of an omnibus reform of the federal habeas statute. *See* note 28, *supra*. As Justice O'Connor has previously recognized, the circumstances surrounding the appointment of counsel in post-conviction proceedings are "one of legislative choice based on

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[40] *See, e.g.*, notes 21 to 24, and accompanying text, *supra* (discussing elimination of automatic stay under section 2251 and establishment of certificate of probable cause requirement); *Public Policy Lessons, supra*, at 307-08 (discussing certificate of probable cause requirement).

difficult policy considerations and the allocation of scarce legal resources." *Murray*, 492 U.S. at 13 (O'Connor, J., concurring). Until and unless Congress does so, there is no statutory authority for lower federal courts to stay the enforcement of presumptively valid and final state court judgments *prior* to the filing of a federal habeas petition.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be affirmed.

Dated: February 14, 1994

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APPENDIX
RELEVANT STATUTORY PROVISIONS

* * *

All Writs Act

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

* * *

Federal Habeas Stay Provision

28 U.S.C. § 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

* * *

Automatic Stay Provision
(1867 Federal Habeas Statute)

Act of Feb. 5, 1867, § 1, ch. 28, 14 Stat. 385 (first habeas corpus statute permitting federal court review of state court judgments) (codified as amended at 28 U.S.C. § 2251), providing in pertinent part:

> [P]ending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.

* * *

Certificate of Probable Cause Requirement

28 U.S.C. § 2253.

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> An appeal may not be taken to the court of appeals from the final order in a habeas corpus

> proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

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Anti-Injunction Act

28 U.S.C. § 2283. Stay of State court proceedings

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

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Anti-Drug Abuse Act of 1988:
21 U.S.C. §§ 848(q)(4)-(10)

21 U.S.C. § 848. Appeal in capital cases; counsel for financially unable defendants

> (q)(4)(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either –
>
> (i) before judgment; or
>
> (ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;
>
> shall be entitled to the appointment of one or more attorneys and the furnishing of such other

services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications,[1] for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to

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[1] The phrase "applications, for writ of certiorari" so in original subsec. (q)(8).

be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

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